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## Origin and Comparative Development of the Law of Watercourses in the Common Law and in the Civil Law

THE established common law of watercourses places the primary rights to watercourses in the owners of the bordering lands. The bordering lands are called "riparian" lands; their owners "riparian" owners; their rights "riparian" rights. The doctrine is sometimes called an ancient one, beginning with the common law itself. This may not be so; in fact it is the object of this paper to offer reasons for thinking that it is not so.

It is a civil law doctrine owing its formulation to the Code Napoleon (the French Civil Code), borrowed thence by American jurists, and finding its complete reception into English law only by American influence. The Year Books and such ancient English mysteries had nothing to do with it. And, on the other hand, modern European law, especially the French, has much to offer now in expounding and applying it.

Both of these things it is our endeavor to present, as material from a new source that may prove its interest and its service alike. The paper is divided into three parts in the following order: I. The Introduction of the Riparian Doctrine into the Common Law from the Civil Law; II. The Source of the Doctrine within the Civil Law; III. The Riparian Doctrine Presented by Civil Law Authorities, and occupying the most of this paper.

### I.

#### INTRODUCTION OF THE RIPARIAN DOCTRINE.

1. Doubt of antiquity may begin from the observation that the word "riparian" as the name of a law of watercourses, or

the words "riparian proprietors," "riparian lands," "riparian rights," made their first appearance in English reports in the year 1849.<sup>1</sup>

The Year Book gave but the bare results of scattered assizes, without discussion.<sup>2</sup> When, in the Seventeenth Century, discussion appeared, it went no further than a question of pleading. A pleading of prescription or ancient custom was held to be the proper allegation; the law of watercourses was treated as resting upon prescription or ancient custom.<sup>3</sup> By the end of the Eighteenth Century and beginning of the Nineteenth the tendency was to pass from this to the doctrine of prior possession whether ancient or not,—the doctrine of prior appropriation. It is considerably the doctrine of Blackstone.<sup>4</sup> As late as 1831, Chief Justice Tindal of the Common Pleas decided the case of *Liggins v. Inge*<sup>5</sup> upon prior appropriation. "By the law of England," he said, "the person who first appropriates any part of the water flowing through his own land to his own use has the right to the use of so much as he thus appropriates against any other." The King's Bench two years later devoted the turning case of *Mason v. Hill*<sup>6</sup> to a re-examination of the law of watercourses, with the intention expressed by Lord Denman "to discuss and, so far as we are able, to settle the principle upon which rights of this nature depend," and prior appropriation was cast out of the English law (1833).

But there is yet no mention of "riparian" rights or a "riparian" doctrine; those terms are still strangers. The Court of Exchequer, in 1839, distinguished *Mason v. Hill* as inapplicable

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<sup>1</sup> *Wood v. Waud* (1849), 3 Exch. 748, 154 Eng. Rep. R. 1047.

<sup>2</sup> The present writer has developed this history with considerably full citation, in another place. Wiel, *Water Rights* (3d. ed.), chapters 28 and 29.

<sup>3</sup> *Id.*; 22 *Harvard Law Review*, 190. Lord Coke, writing at this period, has barely a mention of waters, much less a doctrine thereof. The sole noteworthy passage in Coke is that in which he includes "water" with land under the maxim "*Cujus est solum ejus est usque ad caelum et ad inferos*," a principle which England later accepted for *percolating water*. But it never took hold of the law of running water or watercourses, as we hereafter note, nor did Coke attempt to erect a system of law upon it. Aside from the statement of the maxim, Coke is substantially silent. (See Wiel, *Water Rights*, *supra*.)

<sup>4</sup> "If a stream be unoccupied, I may erect a mill thereon, and detain the water; yet not so as to injure my neighbor's prior mill, or his meadow; for he hath by the first occupancy acquired a property in the current." 2 Bl. Comm. 403.

<sup>5</sup> (1831), 7 Bing. 682, 131 Eng. Rep. R. 263.

<sup>6</sup> 3 B. and Ad. 304, 110 Eng. Rep. R. 114.

(against the party producing it) to a flow of artificial origin;<sup>7</sup> while in 1843 percolating or underground water was also excepted.<sup>8</sup> The latter decision was made in the Court of Exchequer Chamber, where the judges of all these Courts—Common Pleas, King's Bench and Exchequer—sat together; and Chief Justice Tindal of the Common Pleas (who had decided for prior appropriation two years before in *Mason v. Hill*), being again the writer of the opinion, intimated that he still held doubts of the foundation of the doctrine of *Mason v. Hill*. There was still this atmosphere of uncertainty when, in *Wood v. Waud* in 1849, the ruling in *Mason v. Hill* was reiterated by Chief Baron Pollock as having placed the cases for natural streams "upon their right footing."<sup>9</sup> The term "riparian" in reference to the subject occurs in *Wood v. Waud* for the first time (so far as we have discovered) in any English authority. The next case, also in the Exchequer, was *Embrey v. Owen*,<sup>9a</sup> in 1851, since more widely cited, in which Baron Parke adopts the use of the term and repeats the statement that the law of flowing water "is now put on its right footing." Contention in England for prior appropriation or against *Mason v. Hill* subsided after these cases.<sup>10</sup>

2. Working backward from these cases, where the significant first use of the word "riparian" comes in, the authorities mainly relied upon by the English courts are significant. Chief Baron Pollock quotes Kent and Story. "The law is laid down by Chancellor Kent," he says (quoting Kent); "and Mr. Justice Story lays down the same law."<sup>11</sup> Parke cited "the very able

<sup>7</sup> *Arkwright v. Gell* (1839), 5 M. & W. 203, 151 Eng. Rep. R. 87.

<sup>8</sup> *Acton v. Blundell* (1843), 12 M. & W. 324, 152 Eng. Rep. R. 1223.

<sup>9</sup> *Supra*, n. 1.

<sup>9a</sup> (1851), 6 Exch. 353, 20 L. J. Exch. 212, 155 Eng. Rep. R. 579.

<sup>10</sup> Lord Blackburn in *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 854, says the modern law of riparian rights can hardly be considered as settled law in England before the case of *Mason v. Hill*, in 1833. In another case it is said: "Upon the second trial of *Mason v. Hill* a special verdict was found, on the argument on which Lord Denman delivered an elaborate judgment which has always been considered as settling the law as to the nature of the right." *McGlohe v. Smith*, 22 L. R. Ir. 559. Accord as to the effect of *Mason v. Hill*, see *Cocker v. Cowper*, 5 Tyrw. 103; *Embrey v. Owen*, *supra*, n. 9a; *Stockport W. W. Co. v. Potter* (1864), 3 H. & C. 323, 10 Jur., N. S., 1005; *Chasemore v. Richards* (1859), 7 H. L. C. 349, 11 Eng. Rep. R. 140, *Wightman, J.*; *Pugh v. Wheeler* (1836), 19 N. C. 50, *Ruffin, C. J.*; *Gale on Easements* (8th ed.), 258; *Angell on Watercourses* (7th ed.), § 133; *Salmond on Torts* (3rd ed.), 254.

<sup>11</sup> Quoting 3 Kent Comm. 439; Story in *Tyler v. Wilkinson* (1827), 4 Mason 397, Fed. Cas. No. 14, 312.

judgment of the late Mr. Justice Story,"<sup>12</sup> and a late edition of Angell on Watercourses, and quotes at full length Kent's Commentaries. All of these have become classical in the law of the subject.

The word "riparian" is used in all of them. Here is some evidence of the source from which the word "riparian" entered. The inference is strengthened by the fact that Story and Kent had already been cited in the prior English cases,<sup>13</sup> and we find them cited again a few years later when, in another influential English case summarizing the riparian doctrine, Story and Kent were the leading authorities pressed by counsel upon the court.<sup>14</sup>

We are therefore referred, by the English reports themselves, to these American jurists for the designation of the doctrine as a "riparian" one, and for the most approved expression of the doctrine, by the aid of which the English courts were enabled to lay contention at rest.

3. All three were American, prior in date to *Mason v. Hill*, and substantially contemporary with each other. Angell's book issued first (1824). He did not use the name "riparian" anywhere in his first edition; it did not come in until his second edition (1833). Story's opinion in *Tyler v. Wilkinson* was rendered in 1827; Kent's third volume, in which waters are treated, issued in 1828. Although Angell had not, yet both Kent and Story used the name. The subject of watercourses coming, as it does, in Kent's third volume,<sup>15</sup> Story's opinion has precedence over Kent by a few months only, in point of time.

Taking up Story's opinion first, we find no specific authority mentioned by him for using the term, for he expressly says "I shall not attempt to examine the cases at large," and "I have, however, read over all the cases on this subject which are cited at the bar or which are to be found in Mr. Angell's valuable work on Watercourses, or which my own auxiliary researches have enabled me to reach."<sup>16</sup> This sends us to Angell, but examination of Angell's work shows that it was not from there that Story got the suggestion of the term. Angell had not yet used it himself. Nor is it used in any of the cases which

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<sup>12</sup> *Webb v. Portland Manfg. Co.* (1838), 3 Sumner 189, Fed. Cas. No. 17,322.

<sup>13</sup> *Acton v. Blundell*, supra, n. 8, and *Wood v. Waud*, supra, n. 1.

<sup>14</sup> *Miner v. Gilmour* (1858), 12 Moo. P. C. 131, 14 Eng. Rep. R. 861.

<sup>15</sup> 3 Kent Comm. 353 et seq.

<sup>16</sup> *Tyler v. Wilkinson*, supra, n. 11.

Angell gives, nor in any American case at that time contained in the American reports any more than the English. But Angell's testimony here is interesting nevertheless. His first edition was the only one issued at the time of Story's opinion. In its preface the author says that Justice Story had given advice in preparing the book. For this Angell thanks him as "one whose distinguished talents and profound knowledge of the law have made him an ornament and a blessing to this country." It is not surprising to find Story, in his opinion three years later, commending "Mr. Angell's valuable work." When, six years later, Angell issued a second edition, the word *riparian* now for the first time appears in it (1833). He makes special comment upon it as follows: "Those who own the land bounding upon a watercourse are denominated *by the civilians* riparian proprietors, and the same convenient term *was adopted by Mr. J. Story* in giving his opinion in the case of *Tyler v. Wilkinson*." In his still later editions Angell finds it possible to simply say in that place: "—and the same significant and convenient term is now fully introduced into the common law," unnecessary to vouch Story for it, being so fully introduced by that time. According to this intimate evidence thus furnished, re-enforced by the absence of the term previously in England or America, the introduction of the name "*riparian*" into the rights to waters at common law is due to this opinion of Story, who, in turn, took it from the "*Civilians*" and not from the Common law. In what Civil law authorities Story found it we have no mention either by himself or by Angell.

The generation following the Revolution, the first part of the Nineteenth Century, was a formative one in English and American law, but especially in the latter; and in this period revolutionary sympathy with France for its aid, and enmity to England from whom liberation had just come, made for the reception of French authorities. They were widely used in all branches of the law. Some States passed statutes forbidding English authorities to be cited.<sup>17</sup> The use of Civil law authorities in the hands of others was usually ineffective for permanent influence upon the law, but in many branches they become

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<sup>17</sup> Gray, *Nature and Sources of the Law*, p. 323; Pound, 3 *Illinois Law Review*, 354.

very effective for that purpose in the hands of Kent and Story.<sup>18</sup> This disposition of Story and Kent to amalgamate Civil law into the Common law, is common knowledge. Story remarked on one occasion: "We really are sadly ignorant of the vast resources of the Roman, the French, and the other foreign laws, *which may be brought in aid of our common law studies.*"<sup>19</sup> And his biographer records of him that "in all of his works he introduced them (the Civil law principles) in illustration or contradiction of the Common law, *giving the preference often to the former.* I cannot but think, that his works have tended greatly to determine the attention of the profession in this country towards the continental jurisprudence, and that much credit is due to him in pioneering the way, and recommending the advantages of its systems, *as well as for the adoption of many of its principles into our jurisprudence.*"<sup>20</sup>

Kent's own words bear the same testimony. "When I came to the Bench there were no reports of State precedents. The opinions from the Bench were delivered *ore tenus*. We had no law of our own, and nobody knew what it was . . . I made much use of the Corpus Juris, and as the Judges (Livingston excepted) knew nothing of French or civil law, I had immense advantage over them. *I could generally put my Brethren to rout and carry my point by my mysterious wand of French and Civil law.* The Judges were republicans and very kindly disposed to everything that was French, and this enabled me, without exciting any alarm or jealousy, to make free use of such authorities and thereby enrich our commercial law."<sup>21</sup> "I read a great deal in Pothier's works and always consulted him when applicable."<sup>22</sup> The biography of Story shows that mutual high regard existed between the two, and each followed with close attention the work of the other, and in rounding out the Common

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<sup>18</sup> "But very few American judges and lawyers who would have liked to make use of the civil law were able to do so effectively. Kent and Story practically stood alone." Pound in 43 American Law Review, 676 at 688 ("Judge Story in the Making of American Law," by Roscoe Pound). See also Pound in 3 Illinois Law Review, 354, same article as in American Law Review, but with fuller citations. See also, "Value of Roman Law in Technical Curriculum," by Charles Summer Lobinger, 49 American Law Review, 349.

<sup>19</sup> Life and Letters of Joseph Story, Vol. II, p. 414.

<sup>20</sup> Id., pp. 571, 572.

<sup>21</sup> From a letter of Chancellor Kent, dated Oct. 6, 1828, published in 9 Greenbag, 206, 207, and 17 Yale Law Journal, 559.

<sup>22</sup> Kent, letter published in 9 Greenbag, 206 at 210.

law with Civil law principles there was a measure of friendly rivalry between them.

4. While Story does not name the source of his doctrine explicitly, the intimate testimony of Angell, and these circumstances, give us the Civil law, and especially the French law. The origin of Kent's contemporary use of the "riparian" notation, and of his exposition of the riparian doctrine, is not left to inference; it is explicitly stated by him.

Kent is found using in his Commentaries, the words of the Code Napoleon,<sup>23</sup> and in elaborating upon them his leading citations are to the Code Napoleon, the Digest of Justinian, the Codex of Justinian, and the works of Pothier, of Toullier and of Merlin.<sup>24</sup> His text is an unconcealed commentary upon the Civil law, discussing the rule of Pothier and adopting "the just and equitable principle given in the Roman law",<sup>25</sup> at one place incorporating bodily a passage from the Roman Institutes,<sup>26</sup> and closing the exposition of the subject with the following note: "The Code Nalopeon, n. 640, 641, 643, 644, and the Code of Louisiana, arts. 656, 657, establish the same just rules in the use of running water," referring to the rules he has set forth in the text of his commentaries.<sup>27</sup> The words riparian proprietors, riparian rights and the rest, with Civil law and especially French references, come in freely and take their place as apt expressions, although none of the English or American decisions

<sup>23</sup> "Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it or give it another direction and he must return it to its ordinary channel where it leaves his estate." (3 Com. 439). See the Code Napoleon below quoted, n. 24.

<sup>24</sup> 3 Kent Comm. 439, note c, citing at the end, Code Civil (Napoleon) Arts. 641, 643, 644, and at the beginning citing Digest Just., 39.3.4.10, Code Just., lib. 3, t. 34, l. 7; Pothier, *Traité du contrat de Société*, Second app. no. 236, 237; Toullier III, 88, n. 133; Merlin, Rep. Jurisp., tit. Cours de'Eau.

<sup>25</sup> "Pothier lays down the rule very strictly, that the owner of the upper stream must not raise the water by dams, so as to make it fall with more abundance and rapidity than it would naturally do, and injure the proprietor below. But this rule must not be construed literally, for that would be to deny all valuable use of the water to the riparian proprietors. It must be subjected to the qualifications which have been mentioned, otherwise rivers and streams of water would become utterly useless, either for manufacturing or agricultural purposes. The just and equitable principle is given in the Roman law: *Sic enim debere quem meliorem agrum suum facere, ne vicini deteriore faciat.*" 3 Kent Comm. 355 (1828).

<sup>26</sup> "The elements of air, light and water are the subjects of qualified property by occupancy; and Justinian in his Institutes (Inst. 2.1.1) says that they are common by the law of nature." Kent (1st ed.), p. 281.

<sup>27</sup> 3 Kent Comm. 441, note c.



prior to his Commentaries, not even his own decisions, had brought them into the subject.

Not only in the riparian doctrine of watercourses, but in the doctrine of drainage of surface water the same fact is made plain. The investigations of Professor Pound disclose: "The common law as to surface water was formative during this period. A number of jurisdictions avowedly adopted the doctrines of the Civil law. Most of them in so doing cited Kent. In his discussion of water rights, Kent<sup>28</sup> sets forth the doctrines of the Civil law and cites Pothier, Toullier, the Digest and Code of Justinian, and the French Civil Code, and he states as the controlling principle the Roman maxim," etc.<sup>29</sup>

In one place, Kent cites Story's decision of the previous year.<sup>30</sup> The influences of Story and Kent are interwoven, and it is impossible to give precedence to either.

5. The identity of the Common law of watercourses with the Civil law has since been repeatedly acknowledged. Among writers, the statement of Angell that the name "riparian proprietor" is taken from the Civil law has already been noticed. "The owners of watercourses are denominated by the civilians riparian proprietors, and the use of the same significant and convenient term is now fully introduced into the common law."<sup>31</sup> Speaking of the Civil law regarding the use of waters, Mr. Yale says: "These rights do not, as has been seen, differ substantially, so far as private property is concerned, from the common law."<sup>32</sup> According to another writer, the common law of fishing is likewise based upon the Civil law.<sup>33</sup>

Among jurists may be cited a well known decision of Lord Kingsdown, saying and deciding that the French law and the Common law are not materially different.<sup>34</sup> In the Supreme Court of the United States we have recent testimony from Mr. Chief Justice White of the same nature.<sup>35</sup> And we have the same

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<sup>28</sup> Id., 339-441.

<sup>29</sup> The maxim cited is "*Sic enim debere quem meliorem agrum suum facere, ne vicini deteriore faciat.*" (Pound in 3 Illionis Law Review, 354, 360). "Any one may improve his own land provided he does not do it in a way that makes his neighbor's land worse."

<sup>30</sup> 3 Kent Comm. 356.

<sup>31</sup> Angell on Watercourses (6th ed.), § 10.

<sup>32</sup> Yale, Mining Claims and Water Rights, p. 153.

<sup>33</sup> Schultes, Aquatic Rights, p. 1.

<sup>34</sup> Supra, n. 14.

<sup>35</sup> Cubbins v. Mississippi River Commission (1916), 241 U. S. 351, 60 L. Ed. 1041, 36 Sup. Ct. Rep. 671.

testimony in the reports of the Supreme Court of California,<sup>36</sup> and of Texas,<sup>37</sup> and Vermont<sup>38</sup> among others.

The situation then is that the riparian notation did not appear in English decisions until 1849; that it was there taken from American usage, the English law being still in some contention; that the American usage arose through Story and Kent, who both at about the same time took the name and doctrine from the French Civil law. This is far removed from the Year Books, to which it has been so often ascribed. If this presentation is correct, the common law of watercourses is not the ancient result of English law, but is a Civil law doctrine (modern at that) received into English law only through the influence of two eminent American jurists.

## II.

### THE CIVIL LAW SOURCES.

6. The French law under the Code Napoleon (the French Civil Code) was the prominent Civil law when Story and Kent brought it over, and it remains today, with the commentaries upon it, the main offer of interest and profit to us in our current use of the riparian doctrine of watercourses. The newer German jurists have not affected it, waters being left in Germany to local law.<sup>39</sup> On the other hand, the older Civil law, before the Code Napoleon, had not yet worked out the system. "Influence of the Civil law in America has been chiefly an influence of French law. The great German jurists came too late to have much effect, and the Dutch jurists were too early."<sup>40</sup>

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<sup>36</sup> *Irwin v. Phillips* (1855), 5 Cal. 140, 63 Am. Dec. 113; *Lux v. Haggin* (1886), 69 Cal. 255, at 334, 10 Pac. 674; *Wholey v. Caldwell* (1895), 108 Cal. 95, 49 Am. St. Rep. 64, 30 L. R. A. 820, 41 Pac. 31. On the argument in *Lux v. Haggin*, Mr. Hall McAllister read passages of the Spanish law from Escriche, and the following colloquy occurred between him and Mr. Justice McKee: McKee, J.: "What is the difference between that and the common law?" McAllister: "There does not seem to be any material difference so far as I can understand."

<sup>37</sup> "There is no material difference between the common-law rule and that of the Roman and French law." *Fleming v. Davis* (1877), 37 Tex. 173, at 199. See also, *Rhodes v. Whitehead* (1863), 27 Tex. 304, 310, 84 Am. Dec. 631.

<sup>38</sup> *Tuthill v. Scott* (1871), 43 Vt. 525, 5 Am. Rep. 301.

<sup>39</sup> German Civil Code. Introductory Statute, Article 65. "The provisions of State laws relating to rights to the use of water (*Wasserrecht*), including rights of watermills (*Muhlenrecht*) and the rights of inland navigation (*Flussereisrechts*), the provisions relating to the promotion of irrigation and drainage of lands, and the provisions relating to accretion, islands formed by natural forces, and dry river beds, remain unaffected."

<sup>40</sup> Roscoe Pound in 3 *Illinois Law Review*, 354 at 362.

One Roman principle, only, worked through the centuries; namely, the different place given by it to running water as a substance apart from the other material parts of the earth. There has been persistent and nearly uniform quotation and acceptance in the common law and civil law and law of prior appropriation alike, of the statement in the Institutes of Justinian, under the title "Classification of Things," which says: "By natural law these things are common to all: air, *running water*, the sea, and as a consequence, the shores of the sea."<sup>41</sup> This class of things adaptable to general use in common, "*res communes*," are without an owner in their natural situation; they have been called, "the negative community," or "things the property of which belongs to no person." Among them are also the fish, wild animals and game, the light and heat of the sun, and the like. Running water at one instant is in one place in the river, then it is gone and some other water has succeeded it, without anyone having been able to tag it as his own; a thing of continual motion and ceaseless change, incapable of possession or ownership in that condition. The water right of an individual is the intangible *right of flow and use*, a "usufruct." A specific portion severed from the stream and reduced to possession in works that confine it under control, as in a tank, then becomes private property, but only while possession is so held; when it escapes from the tank or is discharged from possession it is again the property of no one. In the "corpus" or body of the natural stream, systems of law of watercourses are systems entirely of *rights to its flow and use*.<sup>42</sup> Being equally applicable and equally applied under the system of riparian rights and the system of prior appropriation, neither doctrine is more favored by it than the other. Although at first sight some have thought prior appropriation thereby favored, yet perhaps in the last analysis the riparian doctrine applies it more logically.<sup>43</sup>

But however this may be, the Roman law prior to the French Civil Code had not itself deduced any uniform doctrine of either kind. It laid down the first principle of all systems, and built no superstructure of any. The Roman digest presents, beyond that first principle, only disjointed expressions which are var-

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<sup>41</sup> Inst. Just. lib. 2, sec. 1. "*Et quidem naturali jure, communia sunt omnium haec aer et aqua profluens, et mare, et per hoc, littora maris.*" This is a restatement of the Dig. Just., lib. I, tit. 8.

<sup>42</sup> Wiel, Water Rights (3d ed.), Part I, and also ch. 41.

<sup>43</sup> 27 Harvard Law Review, 530.

iously cited for all sides of the question.<sup>44</sup> In reviewing this, and citing authors who contended that the Roman law recognized the riparian doctrine, and others equal in number who denied that it did, a recent commentator concludes: "We will not further multiply these citations. They are enough to show the divergencies that they have produced in the interpretation of the Roman law."<sup>45</sup> The obscurity in the Roman law continued through the earlier French law up to the Code Napoleon.<sup>46</sup> "If doubt has been able to arise under the Roman law, it is even more doubtful under the French law of ancient times. The most profound obscurity reigns over the early periods."<sup>47</sup> During the following feudal period the authors were contradictory and conflicting, and there was no accepted rule.<sup>48</sup> Even as late as Pothier we find little upon the subject; he touched it but casually.<sup>49</sup>

The law of watercourses did not become well established in the Civil law until the Code Napoleon (Articles 644-645) in 1804 established the riparian doctrine in France and in the countries upon which Napoleon forced his jurisdiction, which included, among others, Italy and Spain. One French authority says the riparian proprietors have the sole use of non-navigable streams under the French Civil Code; that before the Code it remained for some time in some state of uncertainty, but the enactment of

<sup>44</sup> Dig. Just., lib. 39, tit. 3, de aqua, et aquae pluviae arcendae; Dig. Just., lib. 43, tit. 13, Ne quid in flumine publico fiat, quo aliter aqua fluant, atque uti priore aestate fluxit; Dig. Just., lib. 43, tit. 20, De aqua quotidian et aestiva; Dig. Just., lib. 43, tit. 21, De rivis; Dig. Just., lib. 43, tit. 22, De fonte; Codex Just., lib. 3, tit. 34, De servitutibus et aqua; Codex Just., lib. 11, tit. 42 (43), De aquaeductu.

<sup>45</sup> "Nos ne multiplions pas davantage ces citations. Elles suffisent à expliquer les divergences que se sont produites dans l'interprétation de la loi romaine." Picard (2d ed.)

<sup>46</sup> "The use of running waters gives rise to very frequent disputes. The antagonisms of the diverse interests involved have been at all times so strong and so burning that the words 'river', 'rivalry' are derived from the word 'rive' or at least from the term '*rivales*,' by which the Romans designated the riparian owners." Picard, *Traité des Eaux*, Vol. I (2d ed.), p. 473. The French original reads: "L'usage des eaux courantes donne lieu à de très fréquentes contestations. L'antagonisme des divers intérêts en jeu a été de tout temps si vif et si ardent que les mots '*rivaux*', '*rivalité*,' sont dérivés du mot '*rive*' ou plutôt du terme '*rivales*,' par lequel les Romains désignaient les riverains."

<sup>47</sup> "Si le doute a pu naître sur le droit romain, il s'est accusé bien davantage encore sure l'ancien droit français. L'obscurité la plus profonde règne sur les premiers siècles." Picard, *Traité des Eaux* (2d ed.), Vol. 1, p. 203.

<sup>48</sup> Id., pp. 206-207.

<sup>49</sup> *Supra*, n. 25.

the Code Napoleon (the French Civil Code) left no room for further doubt.<sup>50</sup> Chancellor Kent also says that the French law of waters did not become settled until the Code Napoleon.<sup>51</sup>

The Code Napoleon has been substantially copied in the Italian Code<sup>52</sup> and the Code of Sardinia (1837);<sup>53</sup> while Escriche's *Diccionario* of Spanish law is, upon the subject of waters, not much more than a commentary upon the Code Napoleon, although subsequent Spanish legislation has made some changes.<sup>54</sup> In Germany the Civil Code leaves the subject to the laws of the separate states,<sup>55</sup> but the riparian doctrine prevails in them also. As for Prussia: "In Prussia, watercourses that are neither navigable nor floatable are considered as being the property of the riparian owners."<sup>56</sup> The same is reported as to Bavaria.<sup>57</sup>

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<sup>50</sup> "We should recall that the tendency was before to consider watercourses non-navigable as public property of which the riparian owners had alone the use, and this idea still dominated when the project for a civil code mentioned in the years 1793 and 1794, was proposed in the year IV. While it is true that these attempts, not carried into execution, had left for several years a sort of uncertainty upon the law of property in watercourses not navigable, or floatable, and upon the conditions of this ownership, the enactment of Articles 538 and 644 of the Code do not appear to leave room for further doubts." Pardessus, *Traité de Servitudes*, Vol. I, p. 179. The French original is as follows: "Nous devons reconnoître que le systems étoit alors de considerer les cours d'eaux non navigables comme propriétés publiques dont les riverains avoient seulement l'usage; et cette idée dominait encore lorsqu'un projet de code civil, ebauché en 1793 et 1794, fut proposé en l'an IV. Quand il seroit vrai que ces essais, non suivis d'exécution, eussent laissée pendant quelque temps une sorte d'incertitude sur le droit de propriété des cours d'eaux non navigables, ni flottables, et sur les conditions de cette propriété, le rapprochement des articles 538 et 644 du code ne paroît plus permettre de doutes."

<sup>51</sup> Referring to the opinion of an older French writer (Merlin) that an upper riparian owner could take all the water, Kent says: "But the Civil Code very equitably qualified this doctrine." 3 Kent Comm. 439, note c, citing Code Civil (Napoleon) Arts. 641, 643, 644.

<sup>52</sup> Art. 543.

<sup>53</sup> Arts. 558 and 559.

<sup>54</sup> See, for example, the Spanish Code of Waters of June 13, 1879.

<sup>55</sup> Introductory Statute, Art. 65.

<sup>56</sup> "En Prusse, les cours d'eau que ne sont ni navigables ni flottables sont considérée comme étant la propriété des riverains." Daviel, *Legislation et Pratique des Cours d'Eau*, Tome II, p. 10.

<sup>57</sup> "In the principal states of Germany (Prussia, Landrecht II, 15, sec. 38, and law of 28th of February, 1843: Bavaria: law of May 28, 1852, and of March 20, 1869), water courses are distinguished between public or private according to whether they were not navigable or floatable. The system of private water courses is analogous to ours. The riparian proprietors have the right to the waters, but under the restrictions of the exercise of very wide powers of regulation confided to the administrative authority." Picard, *Traité des Eaux*, Vol. I (2d ed.), pp. 255, 256. The French original reads: "Dans le principaux Etats de l'Allemagne (Prusse: Landrecht, II, 15, sec. 38, et loi du 28 février 1843:—Bavière:

Further, as to all of these countries: "As concerns Italy, watercourses neither navigable nor floatable belong to the riparian proprietors, whether under the old Italian legislation, or under the French Civil Code, or under the *Austrian Code* which governs today the Lombardy-Venetian region."<sup>58</sup> The Louisiana Code copies the Code Napoleon like the rest.<sup>59</sup> It is interesting to note also that the Japanese Code, largely influenced by the German in other respects, contains a provision much like the Code Napoleon in this matter.<sup>60</sup>

Reflexly, we have it bound fast by the French comparing their own law with the English. In England, says the French investigator, the riparian law, as a deduction from the right of access, prevails *as in France*, so far as concerns non-navigable streams.<sup>61</sup> And we have shown how it stands with America.

We may, then, examine the doctrines of the Civil law with justifiable anticipation that they will have interest and profit for us in the investigation of the problems we are now every day meeting, in working under the same law of riparian rights which they have, and which came to us from them.

Lois du 28 mai 1852 et du 20 mars 1869), les cours d'eau se distinguent en publics ou privés suivant qu'ils sont ou non navigables ou flottables. Le régime des cours d'eau privés est analogue au notre. Les riverains ont droit aux eaux, mais sous réserve de l'exercice des pouvoirs très étendus de réglementation confiés à l'autorité administrative."

<sup>58</sup> "Pour ce qui concerne l'Italia, le professeur Romagnosi (Della Condotta delle acque) établit que les cours d'eau non navigables ni flottables appartiennent aux riverains, soit d'après l'ancienne législation italienne, soit d'après le Code Civil français, soit d'après le Code autrichien que régit aujourd'hui tout le royaume Lombardo-Vénitien." Daviel, *Législation et Pratique des Cours d'Eau*, Tome II, p. 7.

<sup>59</sup> La Code, Art. 657.

<sup>60</sup> "When the land on both shores belongs to the owner of the bed of the watercourse he can change the course of the water or the width, but the water must be restored to its natural course at its lower mouth." Civil Code of Japan, Art. 219, De Becker's translation.

<sup>61</sup> (En Angleterre) "The riparian proprietors have no property in the waters; but they are invested with the right to use them, upon public watercourses as well as upon private watercourses, upon condition not to stop the flow and not to make a use thereof unreasonably to the detriment of third persons; this right is considered as the corollary and consequence of the right of access." Picard, *Traité des Eaux*, Vol. I (2nd ed.), p. 256. The French original reads: "Les riverains n'ont pas la propriété des eaux; mais ils sont investis du droit d'en user sur les cours d'eau publics aussi bien que sur les cours d'eau privés, à charge de ne point en arrêter l'écoulement et de n'en pas faire un usage déraisonnable au detriment des tiers: cette faculté est considérée comme l'accessoire et la conséquence du droit d'accès."

## III.

THE RIPARIAN SYSTEM PRESENTED BY CIVIL LAW  
AUTHORITIES.

7. Irrigation is one of the chief concerns of the French law of waters. In parts of France they irrigate throughout the year, the winter use alone mounting sometimes up to 50 litres a second to keep the soil in condition; and resulting in doubling the yield of crops. In the South of France "there is no culture to which it can not be useful"; some cultures are impossible without it. It is generally conceded that a duty of a litre per second is the average requirement for irrigation per hectare of land.<sup>62</sup>

The fundamental law is contained in Article 644 of the Code Napoleon (the French Civil Code), enacted in 1804.<sup>63</sup> This has been elaborated by commentaries. A project to recodify the whole French water law was introduced in 1880 in the bureau of the Senate, with the approval of the Council of State, but never got beyond continual discussion.<sup>64</sup> In 1898 a code was enacted. It has not been obtainable by the present writer, but it can be said that the law of the Code Napoleon is not changed, as the law of 1898 declares that the riparian owners are entitled "to use running water that borders or crosses their lands under the limitations provided by law," which is construed to leave the sections of the Code Napoleon undisturbed.<sup>65</sup>

The riparian doctrine as laid down by section 644 of the Code Napoleon is as follows: "He whose property borders on a running water, other than that which is declared a dependency on the public domain by article 538, under the title of the Classification of Things, may serve himself from it in its passage for the watering of his property. He whose estate such water crosses is at liberty to use it within the space which it crosses, but on condition of restoring it, at its departure from his land, to its ordinary course."<sup>66</sup>

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<sup>62</sup> Picard, "Traité des Eaux," Vol. 4 (2nd ed.), pp. 3-5.

<sup>63</sup> See also Arts. 641, 643.

<sup>64</sup> Id., Vol. I, preface.

<sup>65</sup> Aubrey and Rau, *Droit Civile Français* (5th ed.), pp. 82-83.

<sup>66</sup> Art. 644.—"Celui dont la propriété borde une eau courante, autre que celle qui est déclarée dépendance du domaine public par l'art. 538, au titre de la Distinction des biens, peut s'en servir à son passage pour l'irrigation de ses propriétés. Celui dont cette eau traverse l'héritage peut même en user dans l'intervalle qu'elle y parcourt, mais à la charge de la rendre, à la sortie de ses fonds, à son cours ordinaire."

The first thing pointed out by the Commentators is that this confines use primarily to riparian owners: "*propriétaires riverains*" as they are called in French, and "*ribereños*" as they are called in Spanish. "The rights of use mentioned in article 644 (of the Code Napoleon) are given only to the riparian proprietors; that is, to the proprietors of the estates contiguous to the flow of the water."<sup>67</sup> "The riparian proprietors are the only ones who can avail themselves of the rights of use defined by this article of the Civil Code."<sup>68</sup> "In any event, the law does not give a right in the waters but to him who is riparian." . . . "The text of article 644 does not extend [to non-riparian owners], nor does the spirit of the law; for if it be said that nature gives the waters to all, this means that it gives them to those whose lands touch the waters; it certainly does not give them to non-riparian owners because such are under a natural impossibility to avail themselves of them." (That is, in course of nature alone, they have no access to the water.)<sup>69</sup>

Conversely, non-riparian owners are excluded. Condemnation under the law of eminent domain for public use is the only way that the administrative authorities may recognize rights in non-riparian owners against riparian owners.<sup>70</sup>

The Western reader will the more readily be impressed that this is the law, when he reads the comment, in terms so familiar in the West,<sup>71</sup> that the exclusion of non-riparian owners has provoked numerous criticisms against these dispositions of the

<sup>67</sup> "Les droits d'usage mentionnés en l'art. 644 ne sont accordés qu'aux riverains, c'est-à-dire, aux propriétaires des fonds contigus au cours d'eau." Droit Civil Français, Aubrey & Rau (4th ed.), Vol. III, n. 47.

<sup>68</sup> "Les propriétaires riverains sont donc les seuls qui puissent se prevaloir des droits d'usage définis par cet article du Code civil." Picard, Traité des Eaux, Vol. I (2d ed.), p. 350.

<sup>69</sup> "Dans l'un et l'autre cas, la loi n'accorde de droit sur les eaux qu'à celui qui en est riverain." Laurent, Principes de Droit Civil, Tome 7, p. 326. "Le texte de l'article 644 n'est pas applicable, ni l'esprit de la loi; car si la nature donne les eaux à tous, cela veut dire qu'elles les donne à ceux dont les héritages touchent à l'eau; elle ne les donne certes pas aux non-riverains, puisqu'ils sont dans l'impossibilité naturelle d'en profiter." Id., p. 327.

<sup>70</sup> So a resort to a decree declaring a public use is the only way under which the administrative authority may assign to non-riparian owners rights in running waters, and overthrow the privileges of the riparian owners." Picard (2d ed.), Vol. I, p. 446. The French original follows: "Ainsi la forme du décret déclaratif d'utilité publique est la seule sous laquelle l'autorité administrative puisse attribuer aux propriétaires non riverains des droits sur les eaux courantes et faire tomber le privilège des riverains."

<sup>71</sup> See Wiel, Water Rights in the Western States (3d ed.), §§ 112, 168.



Civil Code as "compromising beneficial use of waters," "sterilizing natural resources useless to the riparians," and "prejudicial to the public interest."<sup>72</sup> These attacks very evidently do not represent the prevalent attitude, however, judging by any impression that they have made. The Code provision has stood since Napoleon's time, against all attacks, has been borrowed therefrom by other countries, and is therefore all the more definitely the law.

Neither nonuse nor priority is of importance. "The right of use given by article 644 (Code Napoleon) is not lost by nonuse."<sup>73</sup> "Nonuse by one riparian owner does not create any right in favor of other riparians," at the time when beginning use by the former detracts from the advantages up to then enjoyed by the latter.<sup>74</sup> "The use of waters for irrigation, by its nature, is not lost by nonuse."<sup>75</sup> "The rights, says the Court, that the law gives to the riparian proprietors relative to the use of running waters, constitute rights which are not lost by nonuse, however prolonged it may be."<sup>76</sup>

<sup>72</sup> "The exclusion of non-riparian owners has provoked numerous criticisms against the dispositions of the Civil Code, which have been reproached with compromising the beneficial use of waters, of sterilizing natural resources unused by the riparian owners, and of being in consequence prejudicial to the public interest." Picard, *Traité Des Eaux* (2d ed.), Vol. I, pp. 350 351. The original reads: "L'exclusion des propriétaires non riverains a provoqué de nombreuses critiques contre les dispositions du Code civil, aux-quelles on a reproché de compromettre la bonne utilisation des eaux, de stériliser des ressources naturelles inutilisées par les riverains et d'être en conséquence préjudiciables à l'intérêt général."

<sup>73</sup> *Droit Civile Français*, Aubry & Rau (4th ed.), Vol. III, p. 52.

<sup>74</sup> "Nonuse of this proprietor does not create any right in favor of other riparian owners and does not permit them to avail themselves of prescription when they are deprived of the advantages that they had until then enjoyed." Picard (2d ed.), Vol. I, p. 411, saying: "L'abstention de ce propriétaire ne crée aucun droit faveur des autres riverains et ne leur permet pas de se prévaloir de la prescription, le jour où ils sont privés des avantages dont ils avaient joui jusque-là," and citing Court of Cassation, civ., 23 novembre 1858. *Spenle c. Hartmann*; req. 11 mai 1868, de Bearn c. Forestas; req., 13 juillet 1869, de Ponteves et commune de Forcalqueiret c. syndicat des arrosants de l'Issole.

<sup>75</sup> Villeroy et Mullen, *Manuel de L'Irrigateur*, p. 302, saying: "L'usage des eaux pour l'irrigation est, par sa nature, imprescriptible par le non-usage," citing Bourges, 8 janvier 1836, *Gestat C. Gourjon*; Daviel, des Cours d'Eau, t. II, n. 581; Proudhon, *Domaine Public*, t. IV, n. 1435; Valserrres, *Manuel du droit rural*, p. 425.

<sup>76</sup> "Les droits, dit la cour, que la loi accorde aux riverains relativement à l'usage des eaux courantes, constituent des facultés qui ne sauraient périr par le non-usage, quelque prolongé qu'on le suppose." Arrêt re rejet du 11 mai, 1868 (Dalloz, 1868, 1, 418). Comparez Bourges, 8 janvier 1856 (Dalloz, au mot *Servitude*, n. 252, 20); Lyon, 15 novembre, 1854 (Dalloz, 1856, 2, 158); Limoges, 25 juillet, 1860 (Dalloz, 1861, 2, 99)." Laurent, *Principes de Droit Civil*, Tome 7, p. 365.

Per consequence, since nonuse does not lose the rights, prior use cannot gain one. Priority in building a dam gives no preference.<sup>77</sup> "Work constructed by a lower riparian owner, even if upon the upper owner's lands, is not alone enough to acquire a right to the waters as against the upper riparian owner." "One may pretend that immemorial use of the waters in a certain way constitutes a servitude to his benefit. This pretension has been refuted by the Court of Orleans; it is contrary to the the principles we shall develop, and which have their base upon the text of the Code itself."<sup>78</sup> "It matters little that the dam of the lower property was established before the (upper) works, and the operation of the two could not both be made; the upper owner rests upon a right of use which he cannot have lost by simple nonuse. In order for the lower proprietor to repel his claim, it is necessary to acquire a further right by force of prescription."<sup>79</sup> "The right cannot be lost to those in whom it is invested, merely by nonuse; it matters little that the other

<sup>77</sup> "The fact of priority in the establishment of a dam is not such as to even lessen the rights of other riparian owners, or to assure, under all circumstances, the maintenance of the former level of the retention of the water. The upper proprietors who would later serve themselves from the waters in their passage, are allowed to address themselves to the tribunals and demand from them a regulation under the terms of article 645 (Code Napoleon). The pre-existence of the retention of the water can not avail for the purpose of cutting off the claims of these proprietors unless the lower riparian proprietor is able to make out a prescriptive right." Picard, *Traité des Eaux* (2d. ed.), Vol. I, p. 375. The original French reads: "Le fait de la priorité d'établissement du barrage ne suffirait même pas pour éteindre les droits des autres riverains et pour assurer dans tous les cas le maintien du niveau primitif de la retenue. Les propriétaires d'amont, qui voudraient ultérieurement se servir des eaux à leur passage, seraient recevables à s'adresser aux tribunaux et à leur demander un règlement dans les termes de l'art. 645. La preexistence de la retenue ne pourrait servir de base à une fin de non-recevoir contre les réclamations de ces propriétaires, que si le riverain d'aval était fondé à se prévaloir de la prescription acquiescive."

<sup>78</sup> "Par cela même, des travaux faits par un riverain inférieur, fût-ce sur le fonds supérieur, ne suffiraient pas pour acquérir un droit sur les eaux au préjudice du riverain supérieur." Laurent, *Principes de Droit Civil*, Tome 7, p. 369. "Celui-ci prétend que l'usage immémorial des eaux d'après un certain mode constitue une servitude à son profit. Cette prétention a été repoussée par la cour d'Orléans; elle est en opposition avec les principes que nous venons de formuler, et qui ont leur base dans le texte même du code." Laurent, *Principes de Droit Civil*, Tome 7, p. 371.

<sup>79</sup> "... il importe peu que le barrage du fonds inférieur ait été établi avant l'usine, dont le fonctionnement ne peut avoir lieu; le propriétaire supérieur se fonde, en effet, sur un droit d'usage qu'il n'a pas pu perdre par la simple abstention. Pour que le propriétaire inférieur puisse repousser sa réclamation, il faut qu'il ait acquis un droit plus fort par voie de prescription: Picard, t. I, p. 369." Labori, *Repertoire de Droit Français*, Vol. 5, pp. 413-414.

riparian owners had enjoyed the waters to a greater extent than they could have done if the co-riparian owner had himself exercised his right; he may always complain of an excessive use of the other riparian owners with a view to himself enjoying a right which he had kept in reserve, however long his inaction may have lasted; with the proviso hereafter noted in reference to the acquisition by the other riparian owners of a paramount right" (by prescription).<sup>80</sup>

It is evident that the statements sometimes found in our Western reports that the Civil law is a system of prior appropriation<sup>81</sup> are not well considered. That the Civil law, on the contrary, holds the riparian doctrine, appears plainly substantiated.

8. Taking up the relative rights of riparian owners among themselves:

The principle of the Common law is that "there is a perfect equality of right" between the riparian owners.<sup>82</sup> Their rights, the Supreme Court of California holds, are "co-equal."<sup>83</sup> In France, "The riparian proprietors upon the watercourse have equal rights to the use of the waters, notwithstanding that by reason of their topographical position the proprietors of the higher lands enjoy their right before the proprietors of lower lands. The former cannot, therefore, do anything which impairs the latter in their use of the waters in their turn."<sup>84</sup> A riparian owner may build dams and ditches, but not to an extent that would be harmful to a neighbor; "In a word, the use of the

<sup>80</sup> "Le droit d'usage, établi par l'art. 644, est imprescriptible, en ce sens que, comme toute faculté légale, il ne peut être perdu, pour ceux qui en sont investis, uniquement par le nonusage; il importerait peu que les autres riverains aient joui des eaux dans une mesure plus étendue que celle à laquelle ils auraient pu prétendre si le riverain eut lui-même exercé son droit; il peut toujours réclamer contre l'usage excessif des autres riverains, en vue de jouir lui-même d'un droit qu'il avait négligé, si longtemps qu'il ait dure son inaction; sous réserve toutefois de ce qui va être dit plus loin, quant à l'acquisition d'un droit plus fort, au profit des autres riverains." Labori, *Repertoire de Droit Français*, Vol. 5, p. 415.

<sup>81</sup> e. g., *Boquillas etc. Co. v. Curtis* (1907), 11 Ariz. 128, 89 Pac. 504.

<sup>82</sup> *Story, J., in Tyler v. Wilkinson*, supra, n. 11.

<sup>83</sup> *Shaw, J., in Hudson v. Dailey* (1909), 156 Cal. 617 at 628, 105 Pac. 748.

<sup>84</sup> "Les propriétaires riverains des cours d'eau ont des droits égaux à l'usage des eaux, bien qu'à raison de leur position topographique les propriétaires des fonds supérieurs exercent leur droit avant les propriétaires des fonds inférieurs. Les premiers ne peuvent, en conséquence, rien faire qui empêche les seconds de jouir des eaux à leur tour." *Villeroiy et Mullen, Manuel de l'Irrigateur*, p. 297.

waters should be equal in favor of both.”<sup>85</sup> The Spanish law is given as follows: “If running water passes between estates of different owners, each one of these can use it for the irrigation of his estate or for any other object; but not the whole of it, but only the part which corresponds to him, because both have equal rights, and one can consequently oppose use of it all by the other, or even a part considerably more than his own.”<sup>86</sup>

Apportionment between the riparian owners is the means resorted to in California, formerly spoken of as a “new method”, of securing this equality.<sup>87</sup> Besides, however, being a frequent resort in other common law states of this country,<sup>88</sup> it has been the established practice in Europe as well. “The tribunals having jurisdiction may order the establishment of the necessary works to assure to each of the riparians the portion of the waters that is apportioned to him.”<sup>89</sup> “The right of use which belongs to all riparian owners does not authorize them to absorb the whole of the water that reaches them, to the detriment of lower riparian owners. The obligation to return exists even when the water is hardly enough for the purpose of the irrigation; that is a question of degree which rests with the Courts to determine under the power conferred upon them by article 645 (Code Napoleon). The riparian proprietors have, in fact, an equal right to the use of the waters, and aside from that, it is proper to regulate this use to the end that each of the riparian owners may count upon a share as near equal as possible of what water there is.”<sup>90</sup>

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<sup>85</sup> “Besides, the right to use the water may not degenerate into such an exclusive right that the lower riparian owners are deprived of the water. The water is a gift of nature for all, in which each of those to whom it may be of use have a right to claim a share.” Pardessus, *Traité de Servitudes*, Vol. I, p. 260, adding (p. 263): “Du reste, la faculté d’user des eaux ne doit pas dégénérer en une occupation tellement exclusive que les inférieurs, en soient privés. L’eau est pour tous un don de la nature, que chacun de ceux à qui elle peut être utile, a droit de réclamer.” Pardessus quotes additional authorities.

<sup>86</sup> Escriche, “Aguas.”

<sup>87</sup> e. g., *Harris v. Harrison* (1892), 93 Cal. 676, 29 Pac. 325.

<sup>88</sup> Authorities cited in *Wiel, Water Rights* (3d ed.), § 751.

<sup>89</sup> *Droit Civile Français* by Aubrey & Rau (4th ed.), Vol. III, p. 58.

<sup>90</sup> *Labori*, Vol. 5, p. 414, further saying: “As a result of their power to apportion the water, the Courts may authorize the works necessary to this apportionment.” The French original reads: “Le droit d’usage qui appartient à tous les riverains ne les autorise pas à absorber la totalité des eaux qui leur arrive, au détriment des riverains inférieurs. L’obligation de restitution existe, alors même que le débit des eaux serait à peine suffisant pour les besoins l’irrigation; il y a là une question de mesure qu’il

In developing this apportionment in California between riparian owners among themselves, matters have arisen, and others will be sure to arise, which are here, in these French authorities, very interestingly discussed.

(a) Between riparian users for the same purpose, as, for example, irrigators among themselves, or various water power owners among themselves, the apportionment is not a mathematical partition of a right, but is a discretionary remedy resting in the discretion of the authority passing upon what is reasonable in each case. "They all have an equal right; one may be tempted therefore to decide that their right should be ruled by the strict law of equality, that is to say, according to the extent of their land holdings. But there are nevertheless other elements that must be taken into account, the mode of cultivation, the nature of the soil, the kind of works employed. It is impossible to lay down an absolute rule and a mathematical equality: that is why the law has left it to the discretion of the Courts, as we shall see further on. Upon this point all the authorities are in accord."<sup>91</sup> The French writer says, "*tout le monde est d'accord*," which literally is "all the world," and it is even true in that literal sense when we read in the reports of the Supreme Court of California: "We anticipate the objection that this is not an absolute rule at all, but, as said by the judges in the opinions quoted from, the very nature of the common right is such that a precise rule as to what is reasonable use by any one proprietor for irrigation cannot be laid down."<sup>92</sup>

Between such users for the same purpose the apportionment may be by rotation, or periods of time, instead of by continuous flow. "Consequently the right of using a specific share contin-

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appartient aux tribunaux de déterminer en vertu des pouvoirs que leur confère l'art. 645. Les riverains ont en effet un droit égal à l'usage des eaux et, d'autre part, il convient de régulariser cet usage, afin que chacun des riverains puisse compter sur une part à peu près égale dans le débit de l'eau." Labori, Répertoire de Droit Français, Vol. 5, p. 414. "Comme conséquence de leur pouvoir de répartir les eaux, les tribunaux peuvent autoriser les ouvrages nécessaires à cette répartition." Id., 418.

<sup>91</sup> "Ils ont tous un titre égal; on serait donc tenté de décider que leur droit doit être réglé d'après la stricte loi de l'égalité, c'est-à-dire, d'après l'étendue de leurs héritages. Mais il y a encore d'autres éléments dont il faut tenir compte, le mode de culture, la nature du sol, le genre d'exploitation. Il est impossible d'établir un règle absolue et une égalité mathématique: voilà pourquoi la loi s'en est rapportée à la sagesse des tribunaux, comme nous le dirons plus loin. Tout le monde est d'accord sur ce point." Laurent, Principes de Droit Civil, Tome 7, p. 333.

<sup>92</sup> *Lux v. Haggin* (1886), 69 Cal. 255, at 408, 10 Pac. 674.

uously is converted in practice to the right to a very considerably larger share during certain periods only; whence the name periodical waters given thereto."<sup>93</sup> With us, this is the well-established rule of *Harris v. Harrison*.<sup>94</sup>

(b) Between two riparian users for different or incompatible purposes, section 645 of the Code Napoleon leaves it to the discretion of the tribunals in charge, to make the interest of agriculture conform with respect for property, always observing local customs and usages.<sup>95</sup> No rule is laid down, and it is left to the discretion, in each case, of the authority appealed to, with due regard to the custom of the stream community. The same principle has been recognized under the Common law.<sup>96</sup>

The Civil law authorities say that majority use among the riparian owners is not a controlling factor; it is discretionary, and if the public interest in the minority use is the more pressing one, the majority must suspend for it. Thus it appears of the Spanish law: "Nevertheless, when it is a question of mills in a country where there are few, and, on account of a drought they need all the water, there ought to be suspended on their account, for the common good, the irrigation of the meadows and the other properties as long as the state of drought lasts."<sup>97</sup> In California this matter was up in *Half Moon Bay Company v. Cowell*,<sup>98</sup> where the Court declared for "the most profitable use." As we understand it, these are all one; the adjustment lies in

<sup>93</sup> "So, the right of using a certain share continuously is converted in practice into a right to control, during certain periods only, a share much larger; hence the name of periodical waters, which waters so used receive." Picard, *Traité des Eaux*, Vol. IV, (2d ed.), p. 8. The original reads as follows: "Ainsi, le droit d'user d'un certain débit continue se convertit, en pratique, en droit de disposer, pendant certaines périodes seulement, d'un débit beaucoup plus considerable; d'où le nom d'eau périodiques, que reçoivent les eaux ainsi utilisées."

<sup>94</sup> *Supra*, n. 87; *Half Moon Bay Co. v. Cowell* (1916), 173 Cal. 543, 160 Pac. 675, and other cases cited in *Wiel, Water Rights* (3d ed.), § 751.

<sup>95</sup> "Article 645 Code Napoleon: If a contest has arisen between the proprietors to whom these waters are useful, the courts, in deciding should make the interest of agriculture conform with respect to property; and, in all cases, the particular and local rules upon the flow and use of waters should be observed." The French reads: "Art 645, Code Napoleon: 'S'il s'élève une contestation entre les propriétaires auxquels ces eaux peuvent être utiles, les tribunaux, en prononçant, doivent concilier l'intérêt de l'agriculture avec le respect de la propriété; et, dans tous les cas, les règlements particuliers et locaux sur le cours et l'usage des eaux doivent être observés.'"

<sup>96</sup> *Wiel, Water Rights* (3d ed.), pp. 805-806, citing authorities.

<sup>97</sup> Escriche, "Aguas."

<sup>98</sup> *Supra*, n. 94.

the discretion of the authority that is to decide, using its best judgment as reasonable men what is a "reasonable use" under each set of circumstances. The custom of the stream community, or majority use (whether most want it for watering stock, or for domestic use, or for irrigation, or for water power), and the comparative profit or benefit, of the incompatible uses, toward the public, are to be considered, although no one thing is alone conclusive. The reference in California to the profit of the use, is evidently to the relative public importance thereof (rather than to the private profit of the individual), in connection also with due consideration of what is the customary or majority use.

(c) The remedy by apportionment, say the French writers, is an adjustment to what is "reasonable under the circumstances," and so may be readjusted by a new apportionment when new circumstances arise. "But they (the decisions under article 645 of the Code Napoleon above quoted, leaving apportionment to the discretion of the deciding authority) are neither irrevocable nor unchangeable. They do not form an obstacle to new decisions, based upon new facts." And as an example, "It is thus when a riparian who has increased his landholding since the first apportionment, will be entitled to a hearing for a new apportionment."<sup>99</sup> In the only California case where this appears to have been passed upon, the same doctrine is recognized.<sup>100</sup>

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<sup>99</sup> "But they are neither irrevocable nor unchangeable. They are no obstacle to new decisions, based on new facts. Demands moved by facts of this nature should not be refused on the ground of prior adjudication. It is thus that a riparian owner who has increased his area, subsequent to a former apportionment, will be admitted to address to the tribunals a claim for a new apportionment." Picard, *Traité des Eaux*, Vol. 1 (2d ed.), pp. 503-504, saying: "Mais elles ne sont ni irrevocables ni immuables. Elles ne font pas obstacle à des décisions nouvelles, basées sur des faits nouveaux. Les demandes motivées par des faits de cette nature ne sauraient être repoussées par l'exception de la chose jugée (citing Art. 1351 du Code civil; Court Cassation, req., 11 mars 1867, Lemaire c. Colin; req., 29 mai 1876, Delaland v. Pesquier; req., 16 juin 1884, Lassale et autre c. Chavaroché). C'est ainsi qu'un riverain qui aurait agrandi son domaine postérieurement au premier réglements, serait recevable à s'adresser au tribunal pour réclamer une nouvelle repartition. (Citing Court of Cassation, req., 11 mars 1867, Lemaire c. Colin.)"

<sup>100</sup> *Los Angeles v. Baldwin* (1879), 53 Cal. 469; *Wiel, Water Rights* (3d ed.), § 752. See also *Caviness v. La Grande Irrigation Co.* (1911), 60 Or. 410, 119 Pac. 731; *Little Walla Irr. Union v. Finis Irr. Co.* (1912), 62 Or. 348, 124 Pac. 666; *In re Willow Creek* (1914), 74 Or. 592, 144 Pac. 505; (1915), 146 Pac. 475; *In re Sucker Creek* (1917), 83 Or. 228, 163 Pac. 430; *Lone Tree Ditch Co. v. Cyclone Ditch Co.* (1910), 26 S. D. 307, 128 N. W. 596.

(d) The apportionment does not affect outstanding riparian owners; if an apportionment between all is desired, all must be made parties to the proceedings. "The judicial decisions taking place between the litigants relative to the use of the waters have no effect except as between the parties. They can neither profit nor prejudice third persons who were not in the case, leaving their rights intact, and are never susceptible of being set up against them."<sup>1</sup>

The same is a settled doctrine of the Supreme Court of California.<sup>2</sup> The concurrence of the California law and the Civil law in the adjustment of the equal rights of riparian owners among themselves is therefore again clearly indicated and the California conclusions supported.

San Francisco Cal., 1918.

*Samuel C. Wiel.*

(TO BE CONCLUDED)

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<sup>1</sup> "Les décisions judiciaires intervenues dans les litiges relatifs à l'usage des eaux n'ont d'effet qu'au regard des parties. Elles ne peuvent ni profiter ni préjudicier aux tiers qui n'étaient point en cause, laissent leurs droits intacts et ne sont jamais susceptibles de leur être opposées." Picard, *Traité des Eaux*, Vol. I (2d ed.), p. 505.

<sup>2</sup> *Strong v. Baldwin* (1908), 154 Cal. 150, at 163, 129 Am. St. Rep. 149, 97 Pac. 178; *Duckworth v. Watsonville Water & Light Co.* (1910), 158 Cal. 206, 215, 110 Pac. 927, and other authorities cited in *Weil, Water Rights* (3d ed.), §§ 625-628, 753. See, also, *Mally v. Weidensteiner* (1915), 88 Wash. 398, 153 Pac. 342.